STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Fitzgerald, P.J., Wilder and Murray, J.J.

In the Matter of:

SHELBY TOWNSHIP,

Respondent/Appellant,

Supreme Court Case No.: 153074
Court of Appeals Case No.: 323491
MERC Case No.: C12 D-067

v

COMMAND OFFICERS ASSOCIATION OF MICHIGAN,

Charging Party/Appellee.

AMICUS CURIAE BRIEF OF THE MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF APPELLANT SHELBY TOWNSHIP

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE**

Michigan Statutes

Other

STATEMENT OF JURISDICTION

Amicus Curiae, Michigan Townships Association, concurs with Appellant Shelby Township's Statement of the Basis of Jurisdiction contained in Shelby Township's Brief on Appeal. Shelby Township sought leave to Appeal the Court of Appeals December 15, 2015 Opinion.[1] The Court of Appeals Opinion affirmed the Michigan Employment Relations Commission Decision and Order dated August 18, 2014.[2] By Order dated February 3, 2017 this Honorable Court granted leave to appeal.[3]

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[1] *Shelby Township v Command Officers Ass'n of Michigan*, unpublished opinion per curiam of the Michigan Court of Appeals issued December 15, 2015, Docket No. 323491 (JA 489a-492a) (hereafter also referred to as Court of Appeals Opinion).

[2] JA 304a – 317a (hereafter also referred to as MERC Decision).

[3] *Shelby Township v Command Officers Ass'n of Michigan*, No. 153074, 889 NW2d 703 (2017).

STATEMENT OF QUESTION PRESENTED

WHETHER THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE TOWNSHIP HAD THE MANDATORY DUTY TO BARGAIN OVER THE PERCENTAGES THAT THE EMPLOYEE GROUPS WOULD CONTRIBUTE AS THE ALLOCATION OF THE EMPLOYEE SHARE OF MEDICAL BENEFIT PLANS DETERMINED PURSUANT TO THE PUBLICLY FUNDED HEALTH INSURANCE CONTRIBUTION ACT, MCL 15.561, ET SEQ?

The Michigan Court of Appeals would answer:	"No".
Appellees answered:	"No".
Appellant Shelby Township answered:	"Yes".
Amicus Curiae Michigan Townships Association answers:	"Yes".

STATEMENT OF FACTS

Amicus Curiae concurs with and hereby adopts Shelby Township's Statement of Material Proceedings and Facts contained in the Township's Brief on Appeal.

ARGUMENT

1. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE TOWNSHIP HAD THE MANDATORY DUTY TO COLLECTIVELY BARGAIN OVER THE PERCENTAGES THAT THE EMPLOYEE GROUPS WOULD CONTRIBUTE AS THE ALLOCATION OF THE EMPLOYEE SHARE OF MEDICAL BENEFIT PLANS DETERMINED PURSUANT TO THE PUBLICLY FUNDED HEALTH INSURANCE CONTRIBUTION ACT, MCL 15.561, ET SEQ.

A. STATEMENT OF INTEREST OF AMICUS CURIAE AND INTRODUCTION

The Michigan Townships Association (MTA) is a Michigan non-profit corporation whose membership consists of in excess of 1,235 townships within the State of Michigan joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under the laws of the State of Michigan. The MTA, established in 1953, is widely recognized for its years of experience and knowledge with regard to municipal issues. Through its Legal Defense Fund, the MTA has participated on an amicus curiae basis in numerous state and federal cases presenting issues of statewide significance to Michigan townships. Pursuant to Michigan Court Rule 7.312(H)(2), the Michigan Townships Association consists of "an association representing a political subdivision" and accordingly authorized to file the within amicus curiae brief in support of the Township.

Resolution of this case centers on statutory interpretation of the Publicly Funded Health Insurance Contribution Act.[4] In 2011, Act 152 was enacted to place limitations on public employer expenditures on employee medical benefit plans.[5] Public employer is broadly defined

[4] 2011 PA 152, as amended, MCL 15.561, et seq. (hereafter also referred to as Act 152).

[5] With medical insurance policy costs spinning out of control, the Legislature enacted these limitations to assist public employers with budgetary issues related to such costs. The State of Michigan alone saved tens of millions of dollars with implementation of Act 152. As will be discussed, these limitations were clearly designed to help public employers control costs by

in Section 2 subsection (h) of Act 152 to include, among others, the State of Michigan, local units of government, school districts, community colleges, and institutions of higher education. This broad definition captures just about every public employer in the State.

Section 3 of Act 152 places a "hard cap" on a public employer's total annual medical benefit plan costs for its employees and elected public officials. Section 3 of Act 152 is the default cap if no other option is annually selected under Act 152.

Section 4 of Act 152 provides an alternate option that limits a public employer to paying not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials.[6] Section 4 must be annually selected by the employer[7] or the Section 3 "hard cap" default cap will automatically apply.

Additionally, it is noteworthy that Section 8 of Act 152 also allows some entities, including townships, to annually elect to "opt-out" all together from the Act 152 limitations.

The significant public interest in this case is apparent since statutory interpretation of Act 152 impacts the State, its governmental subdivisions, and other public employers, as well as their numerous employees. The issues presented are not just case-specific but would have general applicability on all those impacted by Act 152. This case also has significant jurisprudential importance regarding principles of statutory interpretation.

In this case, the Township determined to implement the "percentage cap" option under Section 4 of Act 152 rather than the "hard cap" option under Section 3 or the "opt-out" under Section 8. The Township determined to implement an 80/20 split, requiring the employees and

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limiting union bargaining regarding employee medical benefit plan costs. The requirements of Act 152 apply to the greatest extent allowed regardless of membership in a collective bargaining unit. MCL 15.567(1).

[6] This option is also referred to as the "percentage cap" or "80/20" option.

[7] For the State the election is made by various designated state officials depending on the type of employees (MCL 15.562(a)).

elected officials to pay 20% of the total annual costs of all medical benefit plans it offered or contributed to for its employees and elected official. The Township then, as allowed under Section 4, allocated 20% to its employees and elected officials from an illustrative rate applicable to the respective medical benefit plans. The Township's union then filed a charge against the Township before the Michigan Employment Relations Commission ("MERC"). MERC erroneously determined, among other things, that the allocation of rates under Section 4 of Act 152 was a mandatory subject of bargaining pursuant to the Public Employment Relations Act, MCL 423.201 et seq (also referred to as PERA).

The Court of Appeals in its Opinion upheld the MERC Decision and in doing so erroneously concluded that PERA controls in any conflict with Act 152 and that a public employer's allocation of the amount that specific employee groups must pay toward the overall employee share was a mandatory subject of bargaining. Unfortunately, the Court of Appeals in performing de novo review of the legal issues, erroneously failed to actually analyze the language used in Act 152. Analysis of the actual language of Act 152 leads to a different conclusion. Specifically, Section 4 subsection (2) of Act 152 regarding the "percentage cap" provides in relevant part that:

> "The public employer may allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit."[8] (Emphasis added)

The legislature in recognizing that Act 152 represented a radical departure from prior collective bargaining procedures over medical benefit plans, clearly addressed this issue with the "as it sees fit" language in both the "hard cap", Section 3, and the "percentage cap", Section 4. Further, in Section 5 of Act 152, collective bargaining agreements or other contracts executed after the effective date of Act 152 shall not be inconsistent with the requirements in Section 3 or Section

[8] Similar language can be found in Section 3 of Act 152.

4. Just as a public employer has the unquestioned annual right to select a "hard cap", "percentage cap", or "opt-out" without mandatory bargaining[9], the allocation of cost among employee groups is "as the township sees fit" and mandatory bargaining would similarly not apply. Any new collective bargaining contract or binding arbitration[10] that restricts the employer's allocation determination would be inconsistent with Act 152 and thereby unenforceable. Finally, the Legislature further evidenced its intent with regard to the supremacy of Act 152 over collective bargaining by indicating in Section 7 subsection (1) of Act 152 that the requirements apply to the greatest extent consistent with constitutionally allocated powers regardless of membership in a collective bargaining unit.[11]

It would be nonsensical to be put in a position where collective bargaining and arbitration would occur on an issue that is exclusively controlled to the greatest extent possible by Act 152, specifically left to the choice of the public entity, and determined annually. If allowed, mandatory bargaining would be occurring on a continual non-stop basis due to the annual elections and allocations required under Act 152. Also, the inapplicability of mandatory bargaining regarding allocation is highlighted by the fact that there is now only a limited capped amount and to bargain a lower allocation of costs with one group increases the costs for all other

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[9] This unquestioned right was actually recognized in the Court of Appeals Opinion, p2-3; and the case relied upon therein being *Van Buren Co Ed Ass'n v Decatur Pub Schs*, 309 Mich App 630; 872 NW2d 710 (2015).

[10] Under 1969 PA 312, as amended, (MCL 423.231 et seq.; Act 312) police and fire negotiation impasses can end up in binding arbitration.

[11] It is important to draw attention to the fact that the Brief of Appellee, *Command Officers Association of Michigan,* noticeably does not address Sections 3, 5, or 7 of Act 152 in an obvious attempt to avoid the inability to overcome the provisions therein which are incontrovertibly contrary to their legal argument.

employee groups.[12] For these reasons Act 152 allows allocation as the Township/public employer sees fit.

Although the Court of Appeals should have engaged in de novo review regarding the statutory interpretation of Act 152, it failed to employ proper legal principles of major significance to the state's jurisprudence by not providing any analysis of the plain language of the relevant statutory provisions. The Court of Appeals Opinion is devoid of any analysis in this regard. Instead, the Court of Appeals Opinion simply relied upon the Court of Appeals decision in *Van Buren Co Ed Ass'n v Decatur Pub Schs, supra.* As will be discussed herein, the allocation of the employee's share by the public employer was improperly considered in *Van Buren Co Ed Ass'n, supra,* without any analysis of the relevant statutory language. What we are left with is a Court of Appeals Opinion in the case at bar that is devoid of any analysis of the relevant statutory provisions through its reliance on a case that also provides no analysis of the relevant language. Jurisprudence demands that de novo review of matters of statutory interpretation require an initial analysis of the plain language used by the Legislature to determine legislative intent. Without such initial analysis, any review is pure sophistry rendering a specious determination.

While this Amicus Brief will focus on statutory review of this issue, Amicus Curiae concurs with all of the arguments set forth by Appellant Shelby Township in the Township's Brief on Appeal.

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[12] This concept equally applies to the "hard cap" which limits how much can be spent in total on the medical benefit plan. To give one employee group more necessarily reduces what can be spent on others.

B. STANDARD OF REVIEW

The issues addressed herein regarding the impact of Act 152 on mandatory bargaining involve questions of statutory interpretation, which are reviewed *de novo*.[13]

With regard to MERC's determination giving it authority over the public employer "percentage cap" allocation under Act 152, the Court of Appeals has previously commented upon the limitations on the authority of administrative agencies, noting ". . . that the extent of the authority of public agencies is measured by the statute from which they derived their authority and not by their own acts and assumption of authority."[14]

"Legal rulings of administrative agencies are not given the deference accorded to factual findings. Legal rulings of an administrative agency are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law."[15] "In contrast to [ ] MERC's factual findings, its legal rulings 'are afforded a lesser degree of deference' because review of legal questions remains de novo, even in MERC cases."[16] MERC's interpretation is not binding on the courts as it ". . .cannot conflict with the Legislature's intent as expressed in the language of the statute at issue."[17] The extent that Act 152 has changed mandatory bargaining for public medical benefits can only be determined by review of relevant statutory provisions. The following statutory review demonstrates the erroneous nature of the Court of

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[13] *In Re MCI Telecommunications Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999). *Midland Cogeneration Venture Limited Partnership v Naftaly*, 489 Mich 83, 89; 803 NW2d 674 (2011).

[14] *Ram Broadcasting of Michigan, Inc. v Michigan Public Service Commission*, 113 Mich App 79, 90; 317 NW2d 295 (1982)

[15] *Amalgamated Transit Union Local 1564, AFL-CIO v Southeastern Michigan Transp. Authority* 437 Mich 441, 450; 473 NW2d 249 (1991)

[16] *Branch Co. Bd. of Comm'rs. v Int'l. Union, United Auto., Aerospace and Agricultural Implement Workers of America, UAW*, 260 Mich App 189, 193; 677 NW2d 333 (2003) (citations omitted).

[17] *In re Complaint of Rovas Against SBC Michigan* 482 Mich 90 at 103; 754 NW2d 259 (2008).

Appeals Opinion that upheld the MERC Decision, both in direct conflict with the Legislature's intent.

C. RULES OF INTERPRETATION

The issues before this Honorable Court turn on statutory interpretation. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature."[18] "The first step in that determination is to review the language of the statute itself."[19] "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed and judicial construction is neither required nor permissible."[20] Courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory."[21] Courts "interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole."[22] "[I]n seeking meaning, words and clauses will not be divorced from those which precede and those which follow."[23] "Statutory interpretation requires courts to consider the *placement* of the critical language in the statutory scheme."[24] "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and

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[18] *In re: MCI Telecommunications*, 460 Mich 396, 411; 596 NW2d 164 (1999).
[19] *In re: MCI Telecommunications, supra*, 411.
[20] *In re: MCI Telecommunications, supra*, 411.
[21] *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) citing *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 466 Mich 142, 146; 644 NW2d 715 (2002).
[22] *Johnson, supra*, 177 citing *People v. Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011).
[23] *Sanchick v. State Bd. of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955).
[24] *Johnson, supra*, 177 citing *United States Fidelity & Guaranty Co. v. Mich. Catastrophic Claims Ass'n* (On Rehearing), 484 Mich 1, 12; 795 NW2d 101 (2009).

appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning".[25]

This Honorable Court has articulated a relevant contextual principle as follows:

> "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: '[i]t is known from its associates,' see Black's Law Dictionary (6th ed.), p. 1060. This doctrine stands for the principle that a word or phrase is given meaning by its context or setting." *Brown v Genesee Co. Bd. of Comm'rs* (After Remand), 464 Mich 430, 437, 628 NW2d 471 (2001), quoting *Tyler v Livonia Schs*, 459 Mich 382, 390-391, 590 NW2d 560 (1999)"[26].

In addressing the threshold question of ambiguity, this Honorable Court has held that:

"A term is ambiguous 'when it is *equally* susceptible to more than a single meaning,' *Lansing Mayor v Pub. Service Comm.,* 470 Mich 154, 166, 680 NW2d 840 (2004), not when reasonable minds can disagree regarding its meaning."[27] Further, "ambiguity is a finding of last resort".[28]

As will be determined from the following review, there is no ambiguity in the pertinent statutory language. Accordingly, pursuant to the plain language of Act 152 and PERA, the Township did not have a duty to bargain over the percentages that the employee groups would contribute as the allocation of the employee share of the medical benefit plans. The following application of these rules of statutory interpretation highlight the erroneous nature of the Court of Appeals Opinion.

D. ANALYSIS OF ACT 152

As previously noted, both the Court of Appeals Opinion and the case that it relies on, *Van Buren Co Ed Ass'n, supra,* engaged in flawed analysis of Act 152 by failing to first start with

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[25] *Briggs Tax Service, LLC v Detroit Public Schools, et al*, 485 Mich 69, 77, 780 NW2d 753 (2010), citing MCL 8.3a;
[26] *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 317-318; 645 NW2d 34 (2002).
[27] *Toll Northville Ltd., v Township of Northville*, 480 Mich 6, 15 fn 2; 743 NW2d 902 (2008).
[28] *Lansing Mayor*, supra at 165, citing *Klapp v Limited Insurance*, 468 Mich 459, 474; 663 NW2d 447 (2003).

review of the actual language of the statute in determining the intent of the Legislature with regard to the allocation amounts. The failure to engage in proper analysis lead the Court of Appeals to its erroneous Opinion. In order to achieve a correct opinion, the plain language of Act 152 must be analyzed first. [29]

The object paragraph for Public Act 152 provides that it is:

> "AN ACT to limit a public employer's expenditures for employee medical benefit plans; to provide the power and duties of certain state agencies and officials; and to provide for exceptions; and to provide for sanctions."

It is readily apparent from this language that this new act was intended to allow public employers to regain some modicum of control over the expenditures for employee medical benefit plans by providing for limitations on expenditures and by providing for new administrative powers and duties. The provisions of Act 152 carry forward these objectives and the basis for broad controlling application.

Act 152 provides for broad implementation throughout the State by use of an extremely encompassing definition of public employer in Section 2 subsection (h) which reads as follows:

> "Public employer means this state; a local unit of government or other political subdivision of this state; any intergovernmental, metropolitan, or local department, agency, or authority, or other local political subdivision; a school district, a public school academy, or an intermediate school district, as those items are defined in section 4 to 6 of the revised school code, 1976 PA 451, MCL 380.4 to 380.6; a community college or junior college described in section 7 of article VIII of the State constitution of 1963; or an institution of higher education described in section 4 of article VIII of the State constitution of 1963."

Section 3 of Act 152 provides for a "hard cap" on how much a public employer may contribute to a medical benefit plan which provides in subsection (1) that:

> "Except as otherwise provided in this act, a public employer that offers or contributes to a medical benefit plan for its employees or elected public officials shall pay no more of the annual costs or illustrative rate and any payments for

[29] Of note, the Appellee's Brief fails to provide any relevant statutory analysis of the language used in Act 152 and PERA's reference to Act 152 in MCL 423.215b(4)(b).

> reimbursement of co-pays, deductibles, or payments into health savings accounts, flexible spending accounts, or similar accounts used for health care costs, than a total amount equal to $5,500.00 times the number of employees and elected public officials with single-person coverage, $11,000.00 times the number of employees and elected public officials with individual-and-spouse coverage or individual-plus-1-nonspouse-dependent coverage, plus $15,000.00 times the number of employees and elected public officials with family coverage, for a medical benefit plan coverage year beginning on or after January 1, 2012. A public employer may allocate its payments for medical benefit plan costs among its employees and elected public officials as it sees fit. By October 1 of each year after 2011, the state treasurer shall adjust the maximum payment permitted under this subsection for each coverage category for medical benefit plan coverage years beginning the succeeding calendar year, based on the change in the medical care component of the United States consumer price index for the most recent 12-month period for which data are available from the United States department of labor, bureau of labor statistics." (Emphasis added)

Section 3 of Act 152 is the default limitation that applies to all public employers unless some other option is specifically invoked under Act 152. As we can see, a public employer would use this formula to determine its "hard cap" on what it can spend overall on a medical benefit plan for its employees or elected public officials. Under this "hard cap" a public employer would only have a certain specified amount of money to provide medical benefits to its employees and elected public officials regardless of how many different bargaining groups an employer may have or the varying interests of the employees and elected public officials. Further, this amount would be re-determined each year.

The Legislature in its wisdom and foresight clearly realized that you could not have all the various bargaining groups battling over or attempting to bargain over this finite "hard cap" amount that can be spent overall on a medical benefit plan. It would be unworkable with multiple bargaining groups if it were some type of first come/first serve bargaining over the allocation of payments. One could easily imagine that binding arbitration under Act 312 could award the police union abnormally large portions of the Township's payment for medical plan benefit costs, leaving the fire fighters union and other employees with the scraps. This would

also be an annual occurrence. The Legislature instead solved this bargaining issue over the "hard cap" amount by providing, as above, that "[a] public employer may allocate its payments for medical benefit plan costs among its employees and elected public officials "as it sees fit". Obviously, the key language in this sentence is "as it sees fit". This language must be given meaning and cannot be rendered nugatory. "As it sees fit" plainly provides a public employer the discretionary authority regarding allocation to the exclusion of all others (i.e., MERC, arbitration). The sentence could have easily ended without "as it sees fit" being added to the end. Arguably, in such case, the statute would give a public employer authority to allocate its payments for medical benefit plan costs among its employees and elected officials, but it would not necessarily have the authority to the exclusion of all others. Instead, the Legislature chose to add "as it sees fit" to the end of the sentence. This phrase must be given meaning with regard to the words around it. Moreover, the sentence cannot have the same meaning without it.

"As it sees fit" is an extremely old phrase of very common understanding, giving the holder of the power unfettered discretion. In the context of a governmental entity, however, the discretion must always be tempered by constitutional constraints. In cases where the term "as it sees fit" have been attached to legislative powers, such phraseology has afforded complete legislative discretion subject only to constitutional limitations.[30] This concept shows up in the constitutional limitation on the authority under Act 152 as stated in Section 7(1) of Act 152. In enacting Act 152 the Legislature certainly was aware of collective bargaining under PERA or arbitration of impasses under Act 312. Notably, the words "see fit" have been defined as meaning:

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[30] *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38,* 490 Mich 295, 349; 806 NW2d 683 (2011)

> "Deem appropriate, as in *He's entitled to divide up his property as he sees fit*, or *If we see fit to attend, we'll be there*. This expression uses see in the sense of "view as", a usage dating from about 1325."[31]

Clearly by the plain language of Section 3 the Legislature was intending to provide a public employer with allocation authority "as it sees fit" and only tempered by constitutional constraints. This removes the allocation of funds issue from collective bargaining and binding arbitration. The statutory language could have stated "except as provided through collective bargaining", but it does not.[32]

Next, it is important to review the language of the "percentage cap" option in Section 4 of Act 152. The percentage cap option was selected for use by Shelby Township and provides in relevant part as follows:

> "(1) By a majority vote of its governing body each year, prior to the beginning of the medical benefit plan coverage year, a public employer, excluding this state, may elect to comply with this section for a medical benefit plan coverage year instead of the requirements in section 3. The designated state official may elect to comply with this section instead of section 3 as to medical benefit plans for state employees and state officers.
>
> (2) For medical benefit plan coverage years beginning on or after January 1, 2012, a public employer shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials. For purposes of this subsection, total annual costs includes the premium or illustrative rate of the medical benefit plan and all employer payments for reimbursement of co-pays, deductibles, and payments into health savings accounts, flexible spending accounts, or similar accounts used for health care but does not include beneficiary-paid copayments, coinsurance, deductibles, other out-of-pocket expenses, other service-related fees that are assessed to the coverage beneficiary, or beneficiary payments into health savings accounts, flexible spending accounts, or similar accounts used for health care. For purposes of this section, each elected public official who participates in a medical benefit plan offered by a public employer shall be required to pay 20% or more of the total annual costs of that plan. The public employer may allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit." (Emphasis added)

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[31] *The American Heritage Dictionary of Idioms by Christine Ammer* (2003, 1997).

[32] The impact on collective bargaining was certainly a consideration of the Legislature as evidenced by Sections 5 and 7 of Act 152, infra and MCL 423.215b(4)(b), infra.

As plainly indicated in the language, the "percentage cap" option must be selected annually prior to the beginning of the medical benefit plan coverage year instead of the "hard cap" requirement in Section 3. Further, in subsection (2) of Section 4, a public employer shall not pay more than 80% of the total annual cost of all of the medical benefit plans it offers or contributes to for its employees and elected public officials.

Section 4 subsection (2) then goes on to address allocation of the employee amount stating that "[t]he public employer may allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit."[33] Once again the Legislature has chosen to add the terminology "as it sees fit" to the end of the sentence. Similar to Section 3, this language gives the public employer unfettered, except for constitutional limitations, authority to allocate the employees' share among the employees. This provision necessarily removes this matter from mandatory collective bargaining and binding arbitration of an impasse. MERC, or an arbitrator, would have no authority with regard to the public employer's authority to allocate the share "as it sees fit".

The Legislature was fully cognizant of how these matters would interact with collective bargaining. If the Legislature intended that these matters still be subject to mandatory bargaining, it could have easily added language to that effect. Additionally, mandatory bargaining under Section 4 would create an absurdity as it is an annual election by the public entity as to whether to use the "percentage cap", go back under the "hard cap", or in some cases completely "opt-out" from application of Act 152. These annual elections and subsequent allocations of the employee share would potentially create a situation of constant mandatory

[33] This allocation provision is a little different than the provision in Section 3 as the language only references employees. The prior sentence in Section 3 requires that elected public officials who participate in the medical benefit plan shall be required to pay 20% or more of the total annual cost of that plan.

bargaining without end. In addition, bargaining with one unit would directly impact the costs for other bargaining units or employees of a public employer because of the limits imposed by Act 152. These circumstances were certainly not intended by the Legislature as evidenced by the language used.

The concept of *noscitur a sociis* reasonably dictates that "as it sees fit" should be understood in conjunction with Sections 5 and 7 of Act 152. The legislative intent to make collective bargaining under PERA and arbitration under Act 312 subservient to the requirements of Section 3 and 4 of Act 152 is plainly apparent from the language in Act 152 Section 5 subsection (2) which provides that:

> "A collective bargaining agreement or other contract that is executed on or after September 27, 2011, shall not include terms that are inconsistent with the requirements of sections 3 and 4." (Emphasis added)

Any collective bargaining agreement entered into after September 27, 2011 that would attempt to take the authority from the public employer to select a "hard cap" or "percentage cap" and subsequently allocate the cost "as it sees fit" would be inconsistent with sections 3 and 4 and in direct violation of Act 152.

While generally understood, it is noteworthy that inconsistent has the following dictionary definition:

> "lacking consistency: as
> a: not compatible with another fact or claim < inconsistent statements >
> b: containing incompatible elements < an inconsistent argument >
> c: incoherent or illogical thought or action: changeable
> d: not satisfiable by the same set of values for the unknowns <inconsistent equations > <inconsistent inequalities>"[34]

[34] *Merriam-Webster.com.* http:/www.merriam-webster.com dictionary/inconsistent (accessed Apr. 29, 2016).

Quite unambiguously the Legislature has chosen to nullify new collective bargaining terms or other contracts that have incompatible elements. If a contract requires mandatory bargaining of the annual selection of the "percentage cap" limitation, or the "hard cap" limitation and the allocations "as the public employer sees fit", then those provisions would be incompatible elements or inconsistent with the authority granted public employers under Section 3 and Section 4 of Act 152. Clearly and simply it can be understood that any interference with the public employer's allocation "as it sees fit" would be an inconsistent procedure and, as discussed, involve unauthorized actions.

Section 5(1) of Act 152 is also instructive in providing that:

> "If a collective bargaining agreement or other contract that is inconsistent with Sections 3 and 4 is in effect for one or more employees of a public employer on September 27, 2011, the requirements of Section 3 or 4 do not apply to an employee covered by that contract until the contract expires. A public employer's expenditures for medical benefit plans under a collective bargaining agreement or other contract described in this subsection shall be excluded from calculation of the public employer's maximum payment under Section 4. The requirements of Section 3 and 4 apply to any extension or renewal of the contract." (Emphasis added)

It is self-evident from this provision that the Legislature did not intend to impact contract rights under collective bargaining agreements in effect at the time of enactment of Act 152 but then clearly intended to supersede collective bargaining with regard to Sections 3 and 4 of Act 152 upon expiration, extension, or renewal. Once the contract expires, bargaining pursuant to PERA becomes subservient to Act 152. The concept that the allocation "as it sees fit" controls over mandatory collective bargaining and binding arbitration of an impasse is further evidenced by Section 7 subsection (1) of Act 152 which provides that:

> "The requirements of this act apply to medical benefit plans of all public employees and elected public officials to the greatest extent consistent with constitutionally allocated powers, whether or not a public employee is a member of a collective bargaining unit."

Section 7 subsection (1) of Act 152 plainly and unambiguously evidences the legislative intent to limit the authority of a collective bargaining unit with regard to the requirements of Act 152. If the provisions of Sections 3 and 4 are taken to the greatest extent possible as required, then quite clearly there would be no duty to mandatorily bargain regarding the public employer's allocation of costs or contributions "as the public employer sees fit".[35] Anything less would interfere with the public employer's exercise of this power to the greatest extent consistent with constitutionally allocated powers. In regard to constitutional powers it is important to understand the broad framework for township powers as evidenced in Article VII Section 34 of the Michigan Constitution of 1963, which provides that:

> "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

Consistent with Michigan Constitution of 1963, Act 152 should be liberally construed in the Townships' favor. This Constitutional mandate must be applied. Additionally, Amicus Curiae is unaware of any constitutional provision that would limit or prohibit implementation of Act 152 requirements to the greatest extent.

E. THE COURT OF APPEALS OPINION ERRONEOUSLY RELIES ON MISAPPLIED CASE LAW

As indicated, the Court of Appeals Opinion erroneously failed to perform any analysis of Act 152 language but instead misapplied case law with regard to the determination that the percentage allocation that employee groups will pay towards the employees' portion of the medical benefit plans is a mandatory subject of bargaining.

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[35] Obviously, binding arbitration under Act 312 could not be had in this regard.

First, the Court of Appeals Opinion is incorrect in stating that PERA "controls any conflict with another statute".[36] The preceding analysis of the plain language of Act 152 clearly demonstrates that this statement is false. Section 7 subsection (1) of Act 152 plainly sets forth the Legislative intent of the supremacy of Act 152 over medical benefit plans of all public employees regardless if an employee is a member of a collective bargaining unit. It follows then that Sections 3 and 4 of Act 152 also provide for allocation of employee costs "as the public employer sees fit". Sections 3 and 4 of Act 152 provide specific requirements regarding public medical benefit plans and from the language used are clearly not controlled by PERA. Section 5 subsection (2) of Act 152 further bolsters this statement by providing that "[a] collective bargaining agreement or other contract executed on or after September 27, 2011, shall not contain any terms that are inconsistent with the requirements of sections 3 and 4" of Act 152.[37] These provisions all clearly demonstrate that PERA does not control over any conflicting provision in Act 152. The contrary assertion in the Court of Appeals Opinion is incorrect. In this regard, the Appellee's Brief is misleading in citing several older cases stating that where a conflict exists, PERA is to govern (Ex. Appellee's Brief Page 15). This argument by Appellee ignores the fact that Act 152 is more recent than PERA and contains language specifically in Sections 5 and 7 of Act 152 intended by the Legislature to address conflicts in favor of Act 152. In *Kalamazoo Police Supervisor's Ass'n v City of Kalamazoo*, 130 Mich App 513, 525; 343 NW2d 601, 607 (1983), the Michigan Court of Appeals held:

> "The basis for the Court's holding in *City of Warren*, as well as in other decisions involving the dominance of PERA, was that the Legislature, in enacting the conflicting statute prior to the enactment of PERA, did not have in its mind the concept of public employee collective bargaining."

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[36] Court of Appeals Opinion, p 2, citing *Van Buren Co. Ed. Ass'n, supra.* As discussed, this case failed to analyze the relevant Act 152 language when making this unsupportable statement.
[37] See also Act 152 Section 5(1), supra.

This is not the situation with Act 152.

Additionally, nothing in the language of PERA suggests that it would control over Act 152 requirements. In fact, the opposite is true since PERA specifically acknowledges its subservience to determinations made under Act 152 regarding the employees share for medical benefits. MCL 423.215b(4)(b) provides that if a public employee is eligible to submit a labor dispute for compulsory arbitration under Act 312, then:

> "(b) The increase in employee costs for maintaining health, dental, vision, prescription or other insurance benefits after the collective bargaining contract expiration date that the employee is required to bear under subsection (1) shall not cause the total employee costs for those benefits to exceed the amount of the employee share under the publicly funded health insurance contribution act, 2011 PA 152, MCL 15.561 to 15.569. If the public employer is exempt from limitations of that act, the total employee cost for those benefits shall not exceed the higher of the minimum required employee share under Section 3 or 4 of the publicly funded health insurance contribution act, 2011 PA 152, MCL 15.563 and 15.564, calculated as if the public employer were subject to that act." (Emphasis added).

It is very important to recognize that Act 312 arbitration is specifically controlled by actions taken under Sections 3 or 4 of Act 152. In light of Act 152, it can no longer be said that PERA controls in any conflict.

The Court of Appeals Opinion further erred in citing the case of *Ranta v Eaton Rapids Pub Schs Bd of Ed,* 271 Mich App 261, 270; 721 NW2d 806 (2006) for the proposition that health insurance benefits are a mandatory subject of bargaining.[38] Obviously, the 2006 *Ranta* decision was prior to the Legislature's radical revision to take control over public medical benefit costs under Act 152. Therefore, without any further analysis by the Court of Appeals, it was wholly improper to cite this prior case for the proposition that medical insurance benefits are a mandatory subject of bargaining.

[38] Court of Appeals Opinion, supra, p 2-3.

Finally, the Court of Appeals cites *Van Buren Co Ed Ass'n, supra,* 645-646, for the proposition that "a public employer must bargain about the amount that specific employee groups will pay toward the employees' portion of the contribution".[39] Unfortunately, in reaching this conclusion *Van Buren Co Ed Ass'n* does little more than give judicial gloss to any meaningful review of the language contained in Act 152. It is impossible to properly consider the legislative intent of Act 152 as it relates to this issue without considering Section 7 subsection (1), Section 5 subsections (1) and (2), and the specific language allowing for allocation as the public employer sees fit in Section 3 and 4. The flawed analysis in the Court of Appeals Opinion and *Van Buren Co Ed Ass'n* rendered an erroneous and specious determination. Unlike *Van Buren Co Ed Ass'n* and the Court of Appeals Opinion, the within Argument analyzed the relevant statutory provisions leading to a proper determination of legislative intent in concluding that there is no mandatory duty to collectively bargain over percentages that the employee groups must pay toward the employee portion of the contribution as determined by the public employer "as it sees fit".

[39] Court of Appeals Opinion , supra, 3.

CONCLUSION

For the reasons set forth above, and those set forth in the Township's Brief on Appeal, Amicus Curiae respectfully requests that this Honorable Court reverse the Court of Appeals Opinion and the MERC Decision with regard to Act 152.

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Respectfully submitted,

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